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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JEREME LAVERGNE et al.,

Defendants and Appellants.

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A143332

(Contra Costa County Super. Ct. No. 051212174)

A jury convicted Armond L. Booth and Jereme R. Lavergne (collectively, defendants) of numerous felonies, including second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c))[1] and arson (§ 451, subd. (d)), and found true sentencing enhancement allegations. (§§ 12022, 12022.53.) Defendants moved for a new trial, arguing S.M. (Juror No. 66) committed prejudicial misconduct by discussing the case with her husband, leaving the jury deliberation room with notes, and bringing outside notes into the deliberation room. The trial court denied the motion, concluding there was no juror misconduct and no prejudice and, in the alternative, that any presumed prejudice was rebutted. The court sentenced defendants to state prison and imposed various fines and fees.

[1] All undesignated statutory references are to the Penal Code.

Defendants appeal. They argue the court erred by denying their new trial motion because: (1) the trial judge failed to timely notify counsel of a juror note written during deliberations about Juror No. 66 and to conduct an evidentiary hearing to investigate the concerns raised in the note; and (2) Juror No. 66 committed prejudicial misconduct. Defendants also contend the restitution, parole revocation, and theft fines (§§ 1202.4, 1202.45, 1202.5) must be reduced, and that they are entitled to one additional day of presentence custody credit.

We modify the abstracts of judgment regarding certain fees and custody credits. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We provide a brief overview of the crimes and prosecution evidence, and more detail in the discussion of defendants' specific claims.

Over several months in late 2011, a group of men committed numerous armed robberies of East Bay convenience stores and one grocery store (collectively, convenience stores). The prosecution charged five defendants —including Booth and Lavergne — with over 20 crimes. Terrance Wheeler and Phillip Reed entered pleas. At trial, they testified Lavergne wore a "skeleton hoodie" and Booth wore a Hillary Clinton mask during the robberies. Lavergne and Booth used Lavergne's father's car in all but one robbery. Booth told Wheeler "they blew . . . up" Lavergne's father's car. Booth held a gun during many robberies, including a semiautomatic pistol and a shotgun.

In November 2011, police arrested Booth and Lavergne. The police found loot from the robberies at Booth's home. In a police interview, Lavergne admitted wearing a skeleton hoodie during the robberies; he claimed he stopped committing robberies after his father's car was burned to destroy evidence. Lavergne admitted weapons were fired during the robberies. Lavergne's father testified his son owned a skeleton hoodie like the one worn during the robberies.

The jury viewed surveillance pictures and videos of 12 robberies. Witnesses described the crimes in detail and testified men in masks — including a man in a Hillary Clinton mask and a man in a skeleton hoodie — robbed the convenience stores.

Jury Selection and Jury Instructions

In her jury questionnaire, Juror No. 66 stated she was a retired nurse, married to an attorney. After a break during jury selection, Juror No. 66 sat in the wrong seat and the judge asked her to move to the correct seat. During the court's voir dire, Juror No. 66 said her husband was a retired attorney who specialized in real estate transactions "outside of court" and did not handle criminal cases. Juror No. 66 assured the court she could be fair and impartial, and that she could follow the court's instructions. When questioned by the prosecutor, Juror No. 66 said she was a home health nurse before retiring and that she sat in the wrong chair during jury selection because she "wasn't clear on the seating." Juror No. 66 answered questions asked by Lavergne's counsel and stated she could "listen to what people have to say, but [she] would come up with [her] own conclusion" during deliberations. She answered questions asked by Booth's counsel and was seated on the jury.

As relevant here, the judge instructed the jury: "You've been given notebooks and may take notes during the course of the trial. [¶] Do not remove these notes from the courtroom" and "the notes are for your own individual use, to help you remember what happened during the trial. . . ." During trial, the judge reminded the jury to take notes only on court-provided notebooks, not to take the notebooks home, and not to share notes with anyone.

The Judge Suggests the Parties Replace Juror No. 66

The prosecution began its case on February 3, 2014. On February 18, the judge scheduled jury instructions and closing argument for the following Monday, February 24. On February 20, outside the presence of the jury, the judge "put on the record some information" about Juror No. 66, and suggested "she be relieved of her responsibilities as a juror." The judge noted Juror No. 66: (1) came to court twice when the case was not in session; and (2) took her jury notebook home from court on "one or two occasions . . . In one instance, . . . we were able to successfully retrieve the notebook. In another instance, I think she actually took the notebook with her overnight and brought it back the next day." The judge suggested Juror No. 66's "short-term memory is such that she cannot

remember whether or not she's supposed to be here on any given day or not." The judge also noted, however, that Juror No. 66 "rationally answered" certain questions during voir dire "in a way that might otherwise suggest that she was competent to be a juror." Nevertheless, the judge suggested "under the circumstances it would be appropriate to replace her[.]"

The prosecutor remarked Juror No. 66 had approached Booth's counsel "presumably for directions or something, in the hall. She — whenever I look at her, she has a pretty vacant look on her face, and she just smiles in an odd way, not a polite smile, just kind of a giddy grin, almost child-like. She doesn't seem all that oriented . . . ." The judge offered two additional observations: during voir dire, Juror No. 66 sat in the wrong chair in the jury box, and seemed confused about a trip she had planned "far off into the future, and yet somehow she thought it might interfere" with her jury service. The judge opined: "I don't think Juror No. 66 is going to be, . . . from the defense point of view, a holdout juror for not guilty or a holdout juror for guilty. She strikes me — just in general terms, her personality is that she's going to go with the flow in that type of situation, just based on her personality as I've observed it. [¶] But my view generally is that, particularly for the defendants, they're entitled to have a juror that's actually kind of intellectually with it during the deliberation process. [¶] My recommendation is, I think she ought to be replaced based upon this whole accumulation of pieces of information that suggest to me that she has cognitive deficits." The judge asked for the attorneys' input on whether "to retain her as a juror."

Counsel for Lavergne was inclined "to retain" Juror No. 66 "and simply suggest this is just some absentmindedness on her part. We can certainly inquire of her whether or not she's been diagnosed with any sort of mental illness or received any sort of treatment." Lavergne's attorney, however, did not want to replace Juror No. 66. When counsel for Booth asked which alternate juror would replace Juror No. 66 "[i]f she were to be replaced," the judge stated the replacement would be chosen randomly. Both defense attorneys asked for additional time to make a decision. The prosecutor agreed with the "[c]ourt's assessment" that Juror No. 66 "may not be suitable" but requested

time "to do some research[.]" The judge concluded the hearing by noting: "I want to make sure that the defendants get what they're entitled to here, which is 12 intellectually competent jurors considering this verdict."

Later that day, defendants objected to removing Juror No. 66. The judge responded, "I think it's a mistake" and the prosecutor asked to question Juror No. 66 to "explore" the issue and "ask her how she's doing."

The Judge Questions Juror No. 66 and the Parties Retain Her

On February 24, 2014, the judge asked Juror No. 66 questions to "shed some light on whether or not she's fully capable of serving as a juror . . . ." When the judge asked Juror No. 66 why she had come to court on days when the court was not in session, Juror No. 66 said she came to court one day because she had forgotten court was not in session; she denied coming to court the following day, when the court was also dark. Juror No. 66 explained she had written it down, "but then . . . wasn't sure" so she came to court "to make sure[.]"

Juror No. 66 said her husband drove her to court, prompting the judge to ask why she did not drive herself. Juror No. 66 responded, "I guess he wants the car" and said her husband preferred to drive her car rather than his own. The judge asked Juror No. 66 whether she had "medical issues with respect to memory" or "memory loss" and Juror No. 66 responded, "No." She explained, "Sometimes I forget a few things, but normally I don't have a problem." Juror No. 66 left the courtroom and the prosecutor stated "the People are not moving to have her removed." Defense counsel did not ask the court to remove Juror No. 66.

At the conclusion of the hearing, the judge reiterated its observations about Juror No. 66 and opined the "information suggests" she "has some significant issue listening to and recollecting testimony." The judge noted defendants' attorneys "do not wish this juror to be excused" and explained, "I think if I was deciding this by myself that I probably would excuse this juror based upon the information I have. However, each defendant has a right to have a juror there that he wishes to have there . . . and the Court is not going to impose its will on the parties under these circumstances. [¶] Again, there

is countervailing information. Juror No. 66, when she came in this morning, answered questions. She answered some questions plausibly. One or two of her answers may be actually contrary to the actual facts."

After conferring with their attorneys, defendants declined to excuse Juror No. 66. The prosecutor felt it was a "close call that could go any way" but deferred to the defense's "strategic" decision to retain Juror No. 66. The judge was "nonplussed . . . none of the attorneys . . . think that Juror No. 66 has an issue" and stated there was a "substantial possibility that this juror is operating at some kind of a mental deficit. Both defendants are indicating on the record that they wish to have Juror No. 66 stay so that's what we're going to do."

The "Napkin Note" and the Jury's Verdict

The jury began deliberating on February 26, 2014. After the jury's lunch break on March 4, 2014, Juror No. 12 gave the bailiff a handwritten note on a paper napkin (note, or napkin note) which read: "Per my conversation with madam clerk I would like to request a personal interview regarding questions and concerns (very critical) that I have with the deliberation process."[2] The jury reached a verdict later that day.

The jury convicted Booth of 19 felonies: 15 counts of second degree robbery (§§ 211, 212.5, subd. (c)); arson (§ 451, subd. (d)); assault with a semiautomatic firearm (§ 245, subd. (b); assault with a firearm (§ 245, subd. (a)(2)); and attempted second degree robbery (§§ 664, 211, 212.5, subd. (c)). The jury convicted Lavergne of 18 felonies: 14 counts of second degree robbery (§§ 211, 212.5, subd. (c)); arson (§ 451, subd. (d)); assault with a semiautomatic firearm (§ 245, subd. (b)); assault with a firearm (§ 245, subd. (a)(2)); and attempted second degree robbery (§§ 664, 211). The jury found true numerous sentencing enhancement allegations (§§ 12022, subd. (a)(1)), 12022.53, subds. (b) & (c).)

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[2] The handwritten note is erroneously dated March 4, 2013.

The Judge's Notice to Counsel

On March 5, 2014, the day after the jury reached a verdict, the judge issued the following notice to counsel:

"This NOTICE is provided to counsel to inform them of events that occurred on March 4, 2014 during jury deliberation both before and after the verdicts were announced in open court.

"At the conclusion of the jury's lunch recess on March 4, 2014, Juror #12 provided to the bailiff a paper napkin containing a handwritten note. This item was immediately provided to the court by the bailiff. The court is in possession of this item and counsel may examine it. The napkin requests a confidential interview with the court about "critical concerns" relating to the "deliberation process." I was told verbally by the bailiff that Juror #12 was concerned about other jurors knowing about her request. After looking at the napkin, I directed the bailiff to provide to the juror at the next break in deliberations a copy of the form request used by this court to document all jury requests whether they come from the foreperson or some other juror(s). Given the juror's concern for confidentiality, I directed the bailiff to provide the form to Juror #12 when the jury took their next break during the afternoon and he had the opportunity to provide the document confidentially to that juror.

"To my knowledge, Juror #12 never indicated to the bailiff what the precise nature of her question or problem was. The court's view upon receipt of the note was that it would not be responsible to deal with any problem or juror request for a confidential conference with the court while deliberations were on-going unless and until two things had happened:

1. the juror had communicated in some formal way her concern that would warrant the court's engaging in some intervention in the deliberations that might actually affect the deliberation process; and
2. the court had the opportunity to talk to counsel about how to handle the juror's request.

"Before the jury took an afternoon break in its deliberations, the jury announced that they had reached a verdict. The court took the jury's verdict. It was this court's view that any problem that Juror #12 wanted to address must have been resolved by further deliberations because the jury had reached a unanimous decision on all charges. The taking of the verdict included a polling of the jurors during which all of the jurors, including Juror #12, confirmed that the verdicts reached constituted their individual judgments about the appropriate verdict."

New Trial Motion

Defendants moved for a new trial, arguing Juror No. 66 had committed misconduct by: (1) discussing the case with her husband; (2) bringing outside notes into the jury deliberation room; and (3) leaving the deliberation room with notes. Defendants claimed this misconduct raised a presumption of prejudice which could not be rebutted because "no inquiry was made into [the] note." According to defendants, Juror No. 66's misconduct prejudiced them and "undermined the entire judicial process."

Defendants offered supporting declarations from four jurors. Juror No. 12 — the author of the napkin note — averred: (1) she saw Juror No. 66 take her notebook home during the trial; (2) Juror No. 66 said her husband is an attorney and "would always want to discuss the case"; (3) Juror No. 66 "brought in a . . . legal pad with writing on it" on the last day of deliberations and "took notes on it and wanted to take it along with her other papers to lunch"; (4) when told by the foreperson she was not allowed to bring her own notes from home, take notes home, or take her notebook or other paperwork home, Juror No. 66 "looked completely surprised"; and (5) while the jury discussed one defendant, Juror No. 66 would talk about "the other defendant."

Juror No. 12 called the clerk and explained her concerns. The clerk told Juror No. 12 to "put it in writing" and give it to the bailiff. Juror No. 12 wrote a note on a napkin and gave it to the bailiff. Juror No. 12 was concerned Juror No. 66 "was discussing the case with her husband and getting guidance. She brought in a legal pad with writing on it and she was taking her notes outside the jury room, and I had grave concerns about [Juror No. 12's] competency to sit as a juror." Juror No. 12 continued deliberating, thinking she

would hear from the court about her note, but she was "never called into the court." After reaching a verdict, Juror No. 12 asked the bailiff about the note; the bailiff told her the court wanted her to write her concerns on an "official juror request form" but the bailiff had forgotten to convey this information to Juror No. 12. At the bailiff's suggestion, Juror No. 12 called the clerk the next morning and learned "counsel was made aware of [the] note."

Juror No. 5 averred she saw Juror No. 66 "bringing in her own notebook to the courtroom deliberation room." The notebook had writing on it but Juror No. 5 "could not make out what was written down." Juror No. 5 also saw Juror No. 66 "putting the court notebook in her personal bag." Juror No. 5 told Juror No. 66 "she should not bring in outside notes" and reminded her "a few times not to take the notebook home." On the second to last day of deliberations, Juror No. 5 heard the foreperson tell Juror No. 66 "she should not bring in her own notebook[.]" Juror No. 7 similarly averred she saw Juror No. 66 bringing in her "own small notebook" with writing on it; Juror No. 7 told Juror No. 66 "she was not supposed to bring her own notebook." Juror No. 7 could not read the writing on Juror No. 66's notebook. The foreperson, Juror No. 11, averred she saw Juror No. 66 "bring notes from the outside of the deliberation room" and told her "not to bring in any notes from outside or take any notes home."

In his supporting declaration, a defense investigator stated he spoke with Juror No. 66, who: (1) confirmed her husband is a retired lawyer and that during trial, "she briefly discussed the case" with him; (2) "brought her own yellow legal pad from home on one of the days [the jury] deliberated"; (3) could not remember whether she left the legal pad "in the deliberation room or brought it back home"; and (4) did not know why she wrote the wrong date on the jury questionnaire.

In opposition to the new trial motion, the prosecution argued there was no juror misconduct. According to the prosecution: (1) Juror No.'s 12 opinions regarding Juror No. 66's competency, premised on how Juror No. 66 deliberated, were inadmissible because they intruded on the jury's deliberation process; (2) the declarations in support of the new trial motion did not demonstrate Juror No. 66 discussed the merits of the case

with her husband, or that she deliberated outside the presence of the other jurors; and (3) Juror No. 12's concerns about Juror No. 66's competency were the same concerns raised by the court during trial that defense counsel "chose to disregard." Additionally, the prosecution contended there was no prejudice from any assumed misconduct.

Order Denying New Trial Motion

The trial judge recused himself from ruling on the new trial motion in the event he would be required to testify at an evidentiary hearing and another judge (the court) presided over the hearing on the motion. At the hearing, defendants argued Juror No. 66 committed misconduct and was incompetent to serve as a juror based on a cognitive deficit. According to defendants, the prejudice from the misconduct was presumed and could not be rebutted. In response, the prosecutor argued that even if Juror No. 66's failure to follow the court's instructions constituted misconduct, a new trial was not required because defendants could not establish prejudice. Regarding Juror No. 66's purported lack of competency, the prosecutor argued Juror No. 66 "had her wits about her, she denied any mental health issues or memory problems or health concerns[.]" The prosecution rejected the argument that Juror No. 66 was incompetent because she had to ask questions during deliberations, noting the case was "extremely complicated. . . . We had 15 separate robberies. . . . five or six robber's names. . . . It was voluminous. Very difficult. . . . I would frequently get myself confused. It was one of those cases."

The court denied the motion. In a lengthy ruling, the court concluded there was no juror misconduct and no presumed prejudice and, in the alternative, that any presumed prejudice was rebutted. The court noted the judge went "far beyond the . . . line of duty, to make clear to experienced defense lawyers, who communicated fully with their clients, a concern about a juror" and that defendants kept "the juror, whose conduct is now being questioned." Additionally, the court noted the supporting declarations established "what everybody knew": that Juror No. 66 "absentmindedly . . . was walking in and out with the notebook[.]" The court observed it was "total speculation" Juror No. 66 wrote something "from her husband that said, find him guilty" on her notebook. Additionally, the court determined Juror No. 12's comment that Juror No. 66's husband "would always want to

discuss the case" did not constitute "affirmative evidence that there was a discussion of any substance, only that he would want to do it" and that the defense investigator's declaration "added nothing to the discussion."

The court determined Juror No. 12's statement that Juror No. 66 "talk[ed] about" one defendant while the jury discussed "the other defendant" impermissibly "intrude[d] upon the deliberative process[.]" The court noted its ruling on the new trial motion "would be the same whether" the declarations "were admitted or stricken."

Sentencing

The judge sentenced Booth to 34 years and eight months in state prison and imposed restitution fine and parole revocation fines of $4,560 (§§ 1202.4, 1202.45) and a $656 theft fine (§ 1202.5). The court awarded Booth 1052 days of presentence custody credit. The court sentenced Lavergne to 16 years in state prison and imposed restitution and parole revocation fines of $4,320 (§§ 1202.4, 1202.45) and a $574 theft fine (§ 1202.5). The court awarded Lavergne 1048 days of presentence custody credit.

DISCUSSION

I.

No Abuse of Discretion in Failing to "Investigate" After Receiving the Napkin Note

As described in detail above, Juror No. 12 submitted the napkin note after lunch on the last day of deliberations. The note stated: "Per my conversation with madam clerk I would like to request a personal interview regarding questions and concerns (very critical) that I have with the deliberation process." The judge instructed the bailiff to have Juror No. 12 complete a jury request form detailing her concerns. The bailiff, however, did not give Juror No. 12 the form and the jury reached a verdict later that day. The judge notified counsel about the napkin note the day after the verdict was announced in open court.

Defendants claim the judge's failure to immediately notify counsel about the napkin note and "conduct an inquiry" was an abuse of discretion. We disagree. "'[N]ot every incident involving a juror's conduct requires or warrants further investigation.'

[Citation.] 'The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court. [Citation.] The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial. [¶] . . . [A] hearing is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his [or her] duties and would justify his [or her] removal from the case. [Citations.]' [Citation.]" (*People v. Manibusan* (2013) 58 Cal.4th 40, 53 (*Manibusan*).)

Here, the napkin note "did not provide the court with any information" constituting "good cause to doubt Juror No. [66]'s ability to perform her duties." (*Manibusan, supra,* 58 Cal.4th at p. 53.) The napkin note stated Juror No. 12 had "very critical . . . questions and concerns" about the "deliberation process" but the note did not identify these "questions" or "concerns." The note did not "disclose, or even hint at" juror bias, incompetence, or misconduct — it did not, for example, claim Juror No. 66 could not, or refused, to deliberate. (See, e.g., *People v. Barber* (2002) 102 Cal.App.4th 145, 147-148.)

"When a trial court is aware of *possible* juror misconduct, the court 'must "make whatever inquiry is reasonably necessary"' to resolve the matter. [Citation.] It must do so, however, only when the defense comes forward with evidence that demonstrates a 'strong possibility' of prejudicial misconduct. [Citation.]" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1255.) Here, the napkin note did not raise the possibility of juror misconduct, let alone the "'*strong* possibility' of prejudicial misconduct." (*Ibid.*, italics added.) As a result, the judge did not abuse his discretion by declining to conduct an inquiry after receiving the note. (*Manibusan, supra,* 58 Cal.4th at p. 53 [court's failure to "conduct a second inquiry upon receiving a request from the jury to change forepersons" was not an abuse of discretion].)

The cases upon which defendants rely do not demonstrate the judge abused his discretion. In *People v. Harper* (1986) 186 Cal.App.3d 1420 (*Harper*), a juror recited the dictionary definition of murder to the jury during deliberations and the jury sent a note to

the court stating "[s]omeone actually looked murder up in a dictionary." The trial court admonished the jury not to use the dictionary and to "'put aside the dictionary definition [of murder] and not consider it.'" (*Id.* at pp. 1426, 1428.) In *Harper*, the jury's note explicitly identified juror misconduct, triggering the court's duty to address the misconduct. Here, the napkin note did not describe any juror misconduct. Under the circumstances, the judge's failure to investigate was not an abuse of discretion.

Nor is this case — as defendants suggest — like *People v. Burgener* (1986) 41 Cal.3d 505 (*Burgener*), disapproved on another point in *People v. Reyes* (1998) 19 Cal.4th 743, 754. There, the trial court erred by failing to conduct an investigation after a juror told the court another juror seemed intoxicated during deliberations. (*Burgener*, at pp. 520-521.) The *Burgener* court held "an inquiry sufficient to determine the facts is required whenever the court is put on notice that good cause to discharge a juror may exist." (*Id.* at p. 519.) Unlike *Burgener*, the judge here was not "on notice that good cause" existed to discharge a juror. As discussed above, the napkin note did not identify any juror misconduct. (*Ibid.*) We conclude the judge did not abuse his discretion by declining to investigate the napkin note. (See *People v. Cowan* (2010) 50 Cal.4th 401, 507 [trial court acted within its discretion when it declined to "inquire further" into "ambiguous" information suggesting a juror "may or may not" have talked to the defendant's relatives].)[3]

Defendants' speculation about information the investigation might have yielded does not demonstrate the judge erred by failing to conduct an inquiry. As illustrated by the declarations offered in support of the new trial motion, any inquiry would have revealed only that Juror No. 66 had brought a legal pad with notes into the deliberation

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[3] It was not unreasonable for the judge to require Juror No. 12 to use a court-approved form to communicate her concerns. Any "inquiry into grounds for discharging a deliberating juror should be as limited as possible" to preserve the "sanctity and secrecy of the deliberative process." (*Manibusan, supra,* 58 Cal.4th at p. 53.)

room.[4] Before the jury began deliberating, the parties knew Juror No. 66 had brought her juror notebook home, and that she might have a memory issue. The court and the attorneys examined Juror No. 66 at a hearing, and the defense attorneys made a strategic decision to retain her.

II.

No Error in Denying Defendants' New Trial Motion

In their new trial motion, defendants argued Juror No. 66 committed misconduct by discussing the case with her husband, bringing outside notes into the jury deliberation room, and leaving the deliberation room with notes. "In ruling on a request for a new trial based on jury misconduct, the trial court must undertake a three-step inquiry. [Citation.] First, it must determine whether the affidavits supporting the motion are admissible. [Citation.] If the evidence is admissible, the trial court must determine whether the facts establish misconduct. [Citation.] Lastly, assuming misconduct, the trial court must determine whether the misconduct was prejudicial. [Citations.]" (*People v. Dorsey* (1995) 34 Cal.App.4th 694, 703-704.) "In determining whether misconduct occurred, '[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.] Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination. [Citations.]' [Citation.]" (*People v. Majors* (1998) 18 Cal.4th 385, 417.)

A. Defendants' Supporting Declarations Do Not Establish Misconduct

In denying the new trial motion, the court determined the defense investigator's declaration "added nothing to the discussion" and that one sentence from Juror No. 12's supporting declaration impermissibly "intrude[d] upon the deliberative process." The court also stated its ruling on the motion "would be the same whether" the declarations were "admitted or stricken." Defendants assume the investigator's declaration was

[4] As we discuss below, the defense investigator's declaration containing the hearsay statement that Juror No. 66 had "briefly discussed the case" with her husband at some unspecified point during the trial, is inadmissible to establish juror misconduct.

admissible. We disagree. The declaration contained hearsay — it recounted out-of-court statements made by Juror No. 66, and was offered to establish she brought her own notepad into the deliberation room and briefly discussed the case with her husband. (*Manibusan, supra,* 58 Cal.4th at p. 55 [defense investigator's declaration recounting jurors' statements "contain[ed] hearsay"]; *People v. Dykes* (2009) 46 Cal.4th 731, 811 [defense investigator's report "interposed a level of hearsay" and was "probative only if the investigator's assertions—that the jurors had made the comments—were true"].) It is well settled "'a jury verdict may not be impeached by hearsay affidavits.' [Citations.]" (*People v. Williams* (1988) 45 Cal.3d 1268, 1318-1319, abrogated on another point as stated in *People v. Diaz* (2015) 60 Cal.4th 1176; *People v. Bryant* (2011) 191 Cal.App.4th 1457, 1468.) "Hearsay evidence offered in support of a new trial motion that is based on alleged jury misconduct ordinarily is insufficient to establish an abuse of discretion in either denying the motion or declining to conduct an evidentiary hearing. [Citations.]" (*Manibusan, supra,* 58 Cal.4th at p. 55.) Here, the defense investigator's declaration was inadmissible to establish Juror No. 66 committed misconduct.

We are not persuaded by defendants' claim that the jurors' declarations and all "the statements in [those] declarations are admissible" to establish misconduct. The declarations were admissible to the extent they described "overt acts—i.e., statements, conduct, conditions, or events that are open to sight, hearing, and the other senses[.]" (*Manibusan, supra,* 58 Cal.4th at p. 55; Evid. Code, § 1150 [authorizing use of juror declarations to show objective facts occurring in deliberation room which could have improperly influenced the jury].) These "overt acts" are: (1) Juror No. 66's statement that her husband "would always want to discuss the case"; (2) Juror No. 66 took her notebook home during trial; (3) Juror No. 66 brought a legal pad or notebook into the deliberation room with writing on it, took notes on it, and wanted to take it to lunch; and (4) Juror No. 66 brought "notes from outside" into the deliberation room. Juror No. 12's observation that while the jury discussed one defendant, Juror No. 66 would talk about "the other defendant" was inadmissible because it reflected the jury's deliberative process. (*People v. Daya* (1994) 29 Cal.App.4th 697, 716; Evid. Code, § 1150.)

"Jurors 'convers[ing] among themselves, or with anyone else, . . . on any subject connected with the trial' is juror misconduct. [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 332 (*Jackson*).) But there is no admissible evidence Juror No. 66 discussed the case with her husband. Juror No. 12's declaration in support of the new trial motion states Juror No. 66's husband "*want[ed]* to discuss the case," not that Juror No. 66 actually did so. (Italics added.) (See *People v. Linton* (2013) 56 Cal.4th 1146, 1195 [no misconduct where juror vented to husband about "her confusion over something in the case"].)

It is undisputed Juror No. 66 took her notebook home during trial in violation of the court's instructions but — as Lavergne concedes — this is not a "major transgression[.]" (*People v. Linton, supra,* 56 Cal.4th at p. 1194 [juror who violates the trial court's instructions commits misconduct].) Defendants were aware Juror No. 66 had taken her notebook home during trial and declined to excuse her. "Having expressed no desire to have the juror discharged at the time, and indeed no concern the juror had engaged in prejudicial misconduct, [defendants are] not privileged to make that argument now for the first time on appeal.' [Citation.]" (*People v. Holloway* (2004) 33 Cal.4th 96, 124 (*Holloway*).

Several jurors averred they saw Juror No. 66 bring a notebook or legal pad into the deliberation room, and that the notebook had writing on it. The jurors, however, "could not make out what was written" on the notebook. Based on this information, Juror No. 66 did not commit misconduct. Jurors may not bring notes "taken by any other person" into the deliberation room, but there is no indication Juror No. 66's notebook had notes taken by another person. (§ 1137; see 6 Witkin and Epstein, Cal. Crim. Law (4th ed. 2012) § 22, p. 39 (Witkin).) There is similarly no evidence Juror No. 66 introduced any extrinsic material into the jury room. (*People v. Majors, supra,* 18 Cal.4th at p. 430.) This is not a situation where Juror No. 66 "received information about a defendant's prior conviction . . . asked one of the witnesses to clarify evidentiary issues in the case . . . or made erroneous statements of law to the rest of the jury during deliberations . . . ." (*Jackson, supra,* 1 Cal.5th at p. 333.)

B. Any Presumption of Prejudice Was Rebutted

We assume for the sake of argument Juror No. 66 committed misconduct by bringing outside notes into the jury deliberation room, leaving the deliberation room with notes, and by briefly discussing the case with her husband. "A juror's misconduct creates a rebuttable presumption of prejudice, but reversal is required only if there is a substantial likelihood one or more jurors were improperly influenced by bias" (*Holloway, supra,* 33 Cal.4th at p. 125) or that "the misconduct influenced the vote of one or more jurors." (*Jackson, supra,* 1 Cal.5th at p. 332.) "'[B]ias may appear . . . if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was "actually biased" against the defendant.' [Citation.] The surrounding circumstances include 'the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant.' [Citation.]" (*Ibid.*)

There is no likelihood here — let alone a substantial likelihood — Juror No. 66 was biased. When questioned during voir dire, Juror No. 66 indicated she could be fair and impartial and that she would "come up with [her] own conclusion" during deliberations. There was also no likelihood Juror No. 66's assumed misconduct influenced the vote of other jurors. None of the jurors who submitted declarations in support of the new trial motion averred Juror No. 66's conduct influenced their votes. These jurors averred they corrected Juror No. 66 and reminded her of the court's instructions regarding notebooks and outside notes. Additionally, the court instructed the jurors it was up to "you, and you alone, to decide what happened, based only on the evidence that has been presented to you" and to "use only the evidence that was presented in this courtroom." (See *People v. Lavender* (2014) 60 Cal.4th 679, 687 (*Lavender*) [reminder to the jury of the court's instructions was "strong evidence that prejudice does not exist"]; *Godoy v. Spearman* (9th Cir. 2016) 834 F.3d 1078 [assumed prejudice from juror misconduct rebutted].) Finally, the evidence against the defendants was overwhelming. Two robbers, and numerous victims, testified about defendants' role

in the robberies. Loot from the robberies was found at Booth's home, and he told Wheeler about the arson of the car used in the robberies. In a police interview, Lavergne admitted his involvement in the robberies and that his father's car was burned to destroy evidence. The jury viewed surveillance video and pictures of 12 robberies. Based on our review of the entire record, we conclude any presumption of prejudice was rebutted. (See, e.g., *Jackson, supra,* 1 Cal.5th at pp. 333-334 [prejudice from conversation between jurors and prosecution expert rebutted]; *Lavender, supra,* 60 Cal.4th at p. 691; Witkin, *supra,* § 29, p. 51 [it is "improper for a juror to communicate with . . . others concerning the case" but "communications from and to the jurors are often deemed to be nonprejudicial"].) We conclude any presumption of prejudice was rebutted and the court did not err by denying defendants' new trial motion. (*Jackson, supra,* 1 Cal.5th at p. 334.)

The cases upon which defendants rely, including *People v. Cissna* (2010) 182 Cal.App.4th 1105 (*Cissna*), do not alter our conclusion. In that case, a juror spoke daily with a nonjuror about the case; the misconduct "was both pervasive (occurring every single day of the trial) and substantive (involving deliberative-type discussions about the merits of the case)" and it "fundamentally compromised the integrity of the jury's deliberative process and undermined the requirement that the jury alone determine whether a defendant is guilty." (*Id.* at pp. 1118, 1119.) Unlike *Cissna*, any assumed misconduct was neither "pervasive" nor "substantive." (*Id.* at p. 1118.) Juror No. 66 apparently "briefly discussed the case" with her husband at some unspecified point during trial, but there is no indication the discussion concerned defendants' guilt or innocence, nor that any other jurors were affected by it. (*In re Hamilton* (1999) 20 Cal.4th 273, 305-306 [no presumption of prejudice from unauthorized communication by a juror "'unless there is a showing that the content of the communication was about the . . . guilt or innocence of the defendant'" and noting the juror did not discuss the unauthorized communication with the other jurors]; *Lavender, supra,* 60 Cal.4th at pp. 690-691.)

Defendants' reliance on *People v. Honeycutt* (1977) 20 Cal.3d 150 (*Honeycutt*) is similarly misplaced. There, during a break in deliberations, the foreman called an attorney friend and asked whether involuntary manslaughter was a felony or a misdemeanor; apparently the foreman was concerned a conviction of a lesser charge would allow the defendant to avoid prison. (*Id.* at pp. 154-155, 157.) The attorney's response was "inaccurate with respect to the particular charge of involuntary manslaughter." (*Id.* at p. 157.) The California Supreme Court held the foreman was guilty of "egregious misconduct" and that such misconduct "create[d] a high potential for prejudice." (*Id.* at p. 157.) *Honeycutt* held the presumption of prejudice from the misconduct was "reinforced by the evidence" because the "errant juror was the foreman whose perceptions and conclusions may often sway other jurors" and because the "foreman may have elected in favor of a murder conviction notwithstanding considerable evidence supporting the defense of diminished capacity." (*Id.* at p. 158.) Here and in contrast to *Honeycutt*, Juror No. 66 was not the foreperson, and there is no evidence Juror No. 66 asked her husband for "counseling relative to the applicable law." (*Id.* at p. 157.) And unlike *Honeycutt*, there was not "considerable evidence" supporting a defense; instead the evidence overwhelmingly established defendants' guilt. (*Id.* at p. 158.)

"Based on an examination of the entire record, we conclude that the inference of bias was rebutted and that the trial court did not err in denying the [new trial] motion. [Citation.]" (*Jackson, supra,* 1 Cal.5th at 334.)

III.

The Restitution and Parole Revocation Fines Must Be Reduced

At sentencing, the court stated there was a "$240 per count mandatory restitution fine." The court multiplied $240 by the number of defendants' convictions, and imposed restitution fines of $4,560 on Booth and $4,320 on Lavergne (§ 1202.4). The court imposed equivalent parole revocation fines (§ 1202.45). Defendants did not object.

When defendants committed the offenses in 2011, the minimum restitution fine was $200 and the maximum was $10,000. (Stats. 2011, ch. 45, § 1, p. 1868, former § 1202.4, subd. (b)(1).) In 2012, the minimum fine was $240; the maximum fine

remained $10,000. (Stats. 2012, ch. 868, § 3, pp. 7189-7190, former § 1202.4, subd. (b)(1).) Defendants argue the court's use of the 2012 formula was an ex post facto violation.[5] We agree. The increase in the minimum fine from $200 to $240 ""'"makes more burdensome the punishment for a crime'"" and hence cannot be applied to a defendant whose offenses were committed before the effective date of the amendment." (*People v. Saelee* (1995) 35 Cal.App.4th 27, 31; *People v. Souza* (2012) 54 Cal.4th 90, 143 [restitution fine improperly calculated using law applying at sentencing, "rather than the law applicable at the time of the crimes"]; *Martinez, supra,* 226 Cal.App.4th at p. 1190 [reducing restitution fine "using the $200 minimum that was in effect when appellant committed his crimes"].)

The record supports an inference the court intended to use the statutory formula when calculating the restitution fine. (*Martinez, supra*, 226, Cal.App.4th at p. 1190.) As a result, we will use the 2011 statutory formula to reduce the restitution fine to $3,800 for Booth ($200 multiplied by 19, the number of felony counts) and $3,600 for Lavergne ($200 multiplied by 18, the number of felony counts). Because the parole revocation fines imposed must be the same amount as the restitution fines, we will order the parole revocation fine for Booth be set at $3,800 and for Lavergne at $3,600. (§ 1202.45.)

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[5] To forestall an ineffective assistance of counsel claim, we consider defendants' argument notwithstanding their failure to object at sentencing. (See *People v. Martinez* (2014) 226 Cal.App.4th 1169, 1190 (*Martinez*) [trial counsel's failure to object to restitution fine calculated using incorrect statutory minimum was ineffective]; *People v. Norman* (2003) 109 Cal.App.4th 221, 230 [considering issue for first time on appeal to avoid an "inevitable ineffectiveness-of-counsel claim"].) We reject the People's contention that the court did not err by imposing the restitution fines because the statute in effect in 2011 authorized the court to impose a maximum restitution fine of $10,000.

IV.

The Theft Fines Must Be Reduced

Without objection, the court imposed "theft assessments" pursuant to section 1202.5 of $656 on Booth and $574 on Lavergne. As relevant here, section 1202.5 authorizes the court to impose a "fine of ten dollars ($10) in addition to any other penalty or fine imposed" when a defendant is convicted of robbery. (§ 1202.5, subd. (a).) The court imposed a $41 fine per conviction, presumably composed of the $10 base fine, and the following $31 in penalties: a $10 state penalty (§ 1464); $2 state surcharge (§ 1465.7); $5 court facilities construction fund penalty (Gov. Code, § 70372); $7 county penalty (Gov. Code, § 76000); $2 emergency medical services penalty (Gov. Code, § 76000.5); $1 Proposition 69 DNA penalty (Gov. Code, § 76104.6); and $4 state DNA penalty (Gov. Code, § 76104.7, subd. (a)).[6] (See *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1528-1530 [section 1202.5 fine is subject to seven different penalties and surcharges].) The court multiplied $41 by the number of defendants' robbery convictions.

Defendants contend the theft fines must be reduced because "the court miscalculated the penalty assessments for the fine." According to defendants, the state DNA penalty was $3 not $4 (Gov. Code, § 76104.7) and the county penalty was $5, not $7 (Gov. Code, § 76000) when they committed their crimes in 2011.

Relying on *People v. Aguilar* (2015) 60 Cal.4th 862 (*Aguilar*) and *People v. Trujillo* (2015) 60 Cal.4th 850 (*Trujillo*), the People argue defendants forfeited this argument by failing to object at sentencing. Neither case assists them. In *Aguilar* and *Trujillo*, our high court held a defendant who fails to object to an order for payment of probation-related costs and attorney fees forfeits a claim that the trial court erred in failing to make an ability to pay finding, or that the trial court failed to comply with statutory procedural safeguards before imposing the fees. (*Aguilar, supra,* at pp. 866-868;

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[6] The court did not, as required, provide a "detailed recitation of all the fees, fines and penalties on the record," including their statutory bases. (*People v. High* (2004) 119 Cal.App.4th 1192, 1200.)

Trujillo, supra, at pp. 858-859.) Neither case considered a fine imposed pursuant to section 1202.5. Moreover, defendants do not claim they are unable to pay the theft fines; they argue the court violated ex post facto principles when calculating the penalty assessments and calculating the total fines. (See *People v. Voit* (2011) 200 Cal.App.4th 1353, 1374 (*Voit*) [trial court could not impose penalties which "took effect after defendant's crimes were committed"]; *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [no forfeiture of claim regarding unauthorized imposition of section 1202.5 fines].)

Defendants are correct that in 2011, the state DNA penalty was $3, not $4. (Stats. 2009-2010, 8th Ex. Sess., ch. 3, § 1, p. 283, former Gov. Code, § 76104.7.) As a result, and for the reasons discussed above, that penalty must be reduced by $1. (*Voit, supra,* 200 Cal.App.4th at p. 1374 [DNA penalty "cannot be applied retroactively"].) But we are not persuaded by defendants' contention that the county penalty (Gov. Code, § 76000) was $5, not $7. As explained in *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1253-1254: $7 for every $10 is assessed; $2 is allocated for courthouse construction; and $5 is a county penalty allocated for purposes other than courthouse construction.

The theft fine per conviction is $40, comprised of the $10 base fine, and the following $30 in penalties: a $10 state penalty (§ 1464); $2 state surcharge (§ 1465.7); $5 court facilities construction fund penalty (Gov. Code, § 70372); $7 county penalty (Gov. Code, § 76000); $2 emergency medical services penalty (Gov. Code, § 76000.5); $1 Proposition 69 DNA penalty (Gov. Code, § 76104.6); and $3 state DNA penalty (Gov. Code, § 76104.7, subd. (a)). The total theft fine is $640 for Booth ($40 multiplied by 16, the number of robbery convictions) and $560 for Lavergne ($40 multiplied by 14, the number of robbery convictions).

V.

Defendants Are Entitled to One Additional Day of Custody Credit

The parties agree defendants are entitled to one additional day of presentence custody credit. A defendant is entitled to credit for each day in custody, including the day he is arrested and the day the court imposes sentence. (*People v. Garcia* (2014) 223

Cal.App.4th 1173, 1180.) Booth was in custody from his November 2, 2011 arrest until his September 19, 2014 sentencing; he is entitled to 1053 days of custody credit, rather than 1052 days. Lavergne was in custody from his November 6, 2011 arrest until his September 19, 2014 sentencing; he is entitled to 1049 days of custody credit, not 1048 days.

DISPOSITION

We direct the superior court to prepare an amended abstract of judgment for Booth: (1) imposing restitution (§ 1202.4) and parole revocation fines (§ 1202.45) of $3,800; (2) imposing a theft fine (§ 1202.5) of $640; and (3) awarding him 1053 days of presentence custody credit.

We direct the superior court to prepare an amended abstract of judgment for Lavergne: (1) imposing restitution (§ 1202.4) and parole revocation fines (§ 1202.45) of $3,600; (2) imposing a theft fine ($1202.5) of $560; and (3) awarding him 1049 days of presentence custody credit.

The trial court is directed to send certified copies of the amended abstracts of judgment to the Department of Corrections and Rehabilitation. As modified, the judgments are affirmed.

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.